No. 108 *

In the Supreme Court of the United States

OCTOBER TERM, 1962

INTERSTATE COMMERCE COMMISSION,
Appellant

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *et al.*,
Appellees

BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC., AND NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., *AMICI CURIAE*

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* Consolidated with Nos. 109, 110, and 125, *Sea-Land Service, Inc.* v. *N. Y., N. H. & H. R. Co.*, *Seatrain Lines, Inc.* v. *N. Y., N. H. & H. R. Co.*, and *U. S.* v. *N. Y., N. H. & H. R. Co.*

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Opinion Below

The opinion of the district court (R. 241) is reported at 199 F.Supp. 635. The report of the Interstate Commerce Commission (R. 4) is printed at 313 I.C.C. 23.

Jurisdiction

This action was brought under 28 U.S.C. 1336, 1398, 2284, and 2321-2325, to set aside an order of the Inter-

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state Commerce Commission. The judgment of the three-judge district court (R. 263) was entered on January 8, 1962, and the appellants filed their notices of appeal in the district court on March 9, 1962. R. 264, 266, 268, and 271.

The jurisdiction of this Court to review the judgment of the district court on direct appeal rests on 28 U.S.C. §§1253 and 2101(b). This Court noted probable jurisdiction October 8, 1962. R. 273.

Statutes Involved

Involved are the National Transportation Policy (49 U.S.C. preceding §§1, 301, 901, and 1001), and §§15(7), 15a, 305(c), and 307(d) (49 U.S.C. 15(7), 15a, 905(c), and 907(d), respectively), printed as Appendix D to the Jurisdictional Statement of the Interstate Commerce Commission (pp. 128-132).

Questions Presented

The questions presented for review by this Court, as framed in the notices of appeal of the Interstate Commerce Commission, the United States, and appellant Sea-Land Service, Inc., (R. 265, 267, 270[1]) are:

1. Whether, under Section 15a(3) of the Interstate Commerce Act and the National Transportation Policy, the Commission may find not shown to be just and reasonable, and require cancellation of, certain reduced railroad trailer-on-flatcar rates, which are compensatory (i.e., exceed the railroads' out-of-pocket costs in all instances and their fully-distributed costs in many instances) but represent substantial reductions from levels maintained elsewhere to the same levels of the rates of the coastal water carriers and are applicable only to points served

[1] The questions presented by appellant Seatrain Lines, Inc., are set forth at pp. 272-273 of the record herein.

by the coastal water carriers, where the water carriers' service cannot compete at equal rates with the railroads' service and where the reduced rail rates are part of a program of rail rate reductions which threatens the continued existence of the coastal water carriers?

2. Whether, under the foregoing circumstances, the Commission may find such rail rates to be unlawful without finding as a controlling consideration that the competing water carriers are the low cost mode of transportation?

3. Whether, if the Commission must make such a finding, it must do so in terms of the "integral overall rate structure" of the competing modes of transportation?

4. Whether, if the Commission must make such a finding, it is precluded from rejecting any rail rate for a particular movement which yields the railroad's fully-distributed cost which is lower than the fully-distributed cost of the competing water carrier?

Statement

1. *The operations of the various carriers*

In 1957, appellant Sea-Land Service, Inc. (referred to in the Interstate Commerce Commission report by its former name, Pan-Atlantic Steamship Corporation, and referred to hereafter as Sea-Land), changed its method of operation between eastern ports and Southern Atlantic and Gulf ports from a conventional break-bulk service to a "fishyback" service in which it transports demountable highway freight containers in trailerships. By converting four of its vessels into crane-equipped trailerships, it became possible for Sea-Land to provide a door-to-door, motor-water-motor, service from consignor to consignee without the necessity of intervening break-bulk operations, and achieve lower operating costs and a reduction in both cargo-handling time and in-port vessel time. R. 243.

Appellant Seatrain Lines, Inc. (hereinafter Seatrain) offers rail-water-rail service in which loaded railroad cars are placed aboard its vessels at Edgewater, New Jersey, and off-loaded at a southern coast or Gulf port for rail delivery to the consignee. This operation permits a door-to-door service only when both shipper and consignee are located on rail sidings. Seatrain contemplates a modification of this service utilizing containers capable of being transferred readily from highway trailers or flatcars to the seagoing vessel. R. 243.

To compete with these services, and particularly that of Sea-Land which is available to shippers and consignees without access to rail sidings, the appellee railroads considerably extended their "piggyback" (TOFC) highway-rail-highway service, in which highway trailers are loaded on railroad flatcars and at destination are moved by highway to the consignees' doors. R. 244.

2. *The rate-making actions of the various carriers*

Traditionally, water rates, including water-rail and water-motor rates, have been maintained at levels differentially lower than the corresponding all-rail rates, principally because of disadvantages in water service due to perils of the sea, slower transit time, and infrequency of sailings. R. 10-11.[2] On the inauguration of its trailership service, Sea-Land evaluated the existing rate structures of water and overland carriers and concluded that it needed differentials under all-rail rates, but that lesser differentials would be necessary than maintained with respect to its previous break-bulk service. As a result it

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[2] See *Class Rate Investigation, 1939*, 286 I.C.C. 5 (1952), the last major proceeding in which the rates of the Atlantic-Gulf coastwise water carriers were considered, wherein the Commission prescribed reasonable maximum first-class rates on ocean-rail traffic and percentage relations on the lower classes, designed to preserve the then existing differentials of the ocean-rail rates under the all-rail rates.

published rates generally from 5 to 7½ percent lower than the corresponding all-rail rates, but with many variations. R. 11.

By schedules filed to become effective November 14, 1957, and later, the appellee railroads proposed to establish the reduced TOFC rates here at issue. R. 17. The proposed TOFC rates, limited to 66 commodity movements from particular eastern points to Fort Worth and Dallas, Texas, and return, are on a parity with the Sea-Land rates and substantially the same as the Seatrain rates. R. 244.

3. *The decision of the Interstate Commerce Commission*

On petition of Sea-Land, Seatrain, a motor-carrier association, the Secretary of Agriculture, and several municipal authorities, the Commission placed all the TOFC rates in the initial schedule under suspension and investigation in I. & S. Docket No. 6834—"Piggy-Back Rates—Between East and Texas," which also covered the lawfulness of Sea-Land rates between the same points and certain Seatrain rates. This matter, together with three others (I. & S. Docket Nos. M-10415, 6906, and M-11375) involving the lawfulness of numerous other Sea-Land rates, was heard by an examiner who filed a separate report in each. On exceptions by the parties, No. M-10415 was heard by Division 3 of the Commission and on further exceptions by the railroads to the Division 3 report all four dockets were consolidated for hearing and dealt with in a consolidated report by the entire Commission. (313 I.C.C. 23) R. 244.

The Commission held that the proposed reduced TOFC rates were not shown to be just and reasonable and required that the proposed schedules be canceled R. 42.

The principal basis of the Commission's holding was that regardless of whether the rail or the water carriers

had the lower costs of transporting the traffic to which the rates in issue applied, or the lower cost of transportation generally, other considerations were determinative of the lawfulness of the rates, namely its findings and conclusions that there is a public need for the continued existence of the water carriers, that in order to attract traffic in competition with rail carriers the water carriers' rates must be somewhat below the rail rates, that the rail rates in issue were an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence of, the water carriers, and that, therefore, the rejection of reductions in rail rates to the same level as the rates of the competing water carriers was in furtherance of the declared national transportation policy

> . . . to provide for fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each, to promote safe, adequate, economical, and efficient service, and foster sound economic conditions in transportation and among the several carriers, *all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail,* as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. (R. 37. Emphasis the Commission's)

4. ***The decision of the district court***

On February 1, 1961, the appellee railroads filed suit in the United States District Court for the District of Connecticut to set aside the Commission's report and order to the extent that they found the TOFC rates unlawful. R. 218-227. Sea-Land and Seatrain intervened and appeared in defense. R. 228-231, 235-241. On November 15, 1961, the court rendered its opinion (R. 241-259), setting aside the Commission's order requiring cancella-

tion of the TOFC rates, and enjoining the Commission from cancelling TOFC rates which return at least the fully-distributed cost of carriage. R. 258. Judgment was entered on January 8, 1962. R. 263-264.

The court held that, at least on the record before it, the requirement of a rate differential to protect the water carriers violated the 1958 amendment to the Interstate Commerce Act, now appearing as section 15a(3). R. 246-247. The disapproval of the railroad schedule was, in the court's opinion, holding up the railroad rates to protect another mode, and it stated that the evidence and findings do not support the argument that the national transportation policy compels the result achieved by the Commission. R. 247.

The foundation of the court's opinion is its interpretation of section 15a(3) as a prohibition against rate differentials:

> to be qualified only when factors other than the normal incidents of fair competition intervened, such as a practice which would destroy a competing mode of transportation by setting rates so low as to be hurtful to the proponent as well as his competitor or so low as to deprive the competitor of the "inherent advantage" of being the [fully-distributed] low-cost carrier. The "inherent advantage" factor and the "destructive competitive practice" factor were the only two policy factors mentioned in the committee reports. We think the reference to the NTP in §15a (3) indicates an intent that the differential prohibition was to be qualified only when necessary because of the interplay of these two factors. R. 251-252.

The court further held that, in order to be entitled to protection against rate-cutting competition, the protected mode must be the *overall low-cost mode*, not only with respect to the particular movements in question, but beyond even the particular form of service directly involved, so that, to be entitled to such protection, the protected mode

must be shown to be the low-cost mode in general. R. 255-256. The court finally concluded that, in any event, a railroad rate for a particular movement which yields the railroad's fully-distributed cost which is lower than the water carrier's fully distributed cost, may not be disturbed. R. 259.

In the space of two short consecutive paragraphs, the court seems to establish dual and inconsistent standards respecting the Commission's power to set aside rates which return "fully-distributed costs." R. 258-259. First, it enjoined the Commission from cancellation of TOFC rates which return "at least the fully distributed cost of carriage." In the next breath, however, the court concluded that if, "on some enlarged record," the Commission should find water carriage to be the low cost mode, and also that "value of service considerations" [3] demand that the water carriers receive more than fully-distributed costs on particular movements and commodities, then the Commission can require that rail rates be set above the water rates. But in the latter instance, the court adds a caveat—it withdraws from the Commission the power to cancel any rail rate in any instance where it yields the rail's fully-distributed costs and those costs are lower than those of the water carriers.

5. *The interest of the* amici curiae

The issues before this Court are of great interest to American Trucking Associations, Inc. (A.T.A.), and National Motor Freight Traffic Association, Inc. (N.M.F.T.A.). A.T.A. is the national organization of the trucking industry, representing all types of motor carriers of property. Organized and existing as a non-profit corporation under the laws of the District of Columbia,

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[3] Earlier in its opinion the court was highly critical of value of service considerations in rate-making. R. 252-254.

A.T.A. maintains offices at 1616 P Street, N.W., Washington, D.C. N.M.F.T.A. is a non-profit membership corporation, and, pursuant to an agreement approved under Section 5a of the Act, performs for its members through its National Classification Committee, their duties under section 216(b) of the Interstate Commerce Act, 49 U.S.C. 316(b), to establish just, reasonable and otherwise lawful classifications of property for rate-making purposes and just and reasonable regulations and practices relating thereto. N.M.F.T.A. also maintains offices at 1616 P Street, N.W., Washington, D.C. This brief, *amici curiae*, is submitted with the consent of all parties to these cases, pursuant to the provisions of Rule 42(2).

Transportation by motor vehicle over the highways is an essential part of the national transportation system which the Interstate Commerce Act and the National Transportation Policy are designed to regulate, develop, and preserve. The correct interpretation of section 15a(3) and its relationship to other parts of the Act and the National Transportation Policy is equally as vital to motor carriers as to the water and rail carriers. If relative costs are to be given a pre-eminent position in rate-making as between competing modes of transportation, the impact on the motor carriers will be just as drastic as on the intercoastal water carriers, and they will be just as subject to being drawn into relentless rate wars in which they will of necessity become early casualties. It is essential to the continued well-being of the trucking industry (as well as the entire transportation system) that the prohibition against unfair or destructive competitive practices in the national transportation policy be rescued from the stultifying limitations grafted upon it by the district court's decision.

6. *The consequences of an adverse decision*

The necessary consequences of an affirmance of the district court's opinion will be to drastically change the scope

of the national transportation policy as an overriding standard for the administration and enforcement of the provisions of the Interstate Commerce Act. It will place undue emphasis on costs in the regulation of intermodal rate competition, practically repealing other elements of that policy. Destructive competitive rate wars will be unchecked unless all of the costs on all services of the carriers involved are introduced into the record, placing an insurmountable burden on the Commission in its administration of the Act. If the district court decision is allowed to stand, the Commission will be barred from exercising its delegated function of developing, coordinating, and preserving a national transportation system, and will be turned into a gigantic clerical force for the computation and comparison of carrier costs.

Protests against rate reductions on the ground that they constitute destructive competitive practices will often be made impossible to carry through because of the burden placed on the protestant of proving that it is the overall low-cost carrier. The financially powerful modes of transport will be able, through selective rate cutting, to destroy their financially weaker competitors.

SUMMARY OF ARGUMENT

The basic error of the District Court is its interpretation of Section 15a(3) to mean that the comparative cost of carriage is the overriding if not sole factor to be considered in determining whether a "compensatory" rate proposed by one mode of transportation to meet the competition of another mode is below a reasonable minimum rate. This is contrary to the commands of the National Transportation Policy, which governs the Commission in the administration of all provisions of the Act, as well as contrary to Section 15a(3) itself, which requires the Commission to give "due consideration to the objectives of the national transportation policy" in determining whether a rate is "lower than a reasonable minimum rate."

The Commission, prior to the 1958 amendment to the Interstate Commerce Act, had the power to prohibit a rate reduction which constituted a destructive competitive practice, even though the rate was compensatory. This power is implicit in its power to regulate minimum rates, and was articulated as an element of Congressional policy in the national transportation policy. Rather than withdrawing this power from the Commission, the 1958 amendment to the rate-making provisions of the act specifically made that amended rate-making provision subject to the overriding considerations of the national transportation policy.

ARGUMENT

Prior To The 1958 Amendment To The Act, The Commission Had The Power To Reject Proposed Rate Reductions To Prevent Destructive Inter-Modal Competition, Even Though The Proposed Rates Were Compensatory

Prior to the amendment to §15a of the Act, the Commission had and exercised the power to reject proposed rate reductions even though the proposed reduced rates were found to be "compensatory," in that they returned something in excess of out-of-pocket costs.[4] The standard to be applied was epitomized by the Commission (Division 3) in the *Petroleum Products From Los Angeles* report, 280 I.C.C. at 516:

> However, cost, and especially out-of-pocket costs, is only one of the factors which are relevant in determining whether the proposed rates are just and reasonable. In the situation presented, where two modes of transportation are competing for the same traffic and both are necessary to meet the needs of the shippers, rates of both modes must be reasonably com-

[4] E.g. *Pig Iron from Rockwood, Tenn., to Chicago and Joliet*, 298 I.C.C. 430 (1956); *Petroleum Products in California and Oregon*, 284 I.C.C. 287 (1952); *Petroleum Products in Illinois Territory*, 280 I.C.C. 681 (1951); *Petroleum Products From Los Angeles to Ariz. and N. Mex.* 280 I.C.C. 509 (1951).

> pensatory and so related that they will not be unreasonable, unfair, or destructive, but will promote adequate, economical, and efficient service by each mode and preserve the inherent advantages of both.

In *Cantlay & Tanzola* v. *United States*, 15 F. Supp. 72 (S. D. Cal. 1953), the District Court annulled a Commission order approving a rate reduction for the failure of the report and order to show that the Commission considered the possible effect of the rate reduction in eliminating a competing mode of carriage. In *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472 (D. Ore. 1955), *motion for new trial denied*, 134 F. Supp. 210 (1955), the Court permanently enjoined the orders of the Commission approving reduced rail rates, basing its action on a failure of the evidence to show the proposed rates to be compensatory and on the Commission's failure to support its findings that the proposed rates were in harmony with the national transportation policy. In the motion for a new trial, the defendants contended that once the Commission finds that a rate proposed by a carrier is compensatory and no lower than necessary to meet competition, neither the Commission nor a court may interfere with such a rate. The Court, however, stated that in the context of the situation the Commission was required to make findings concerning the need for preserving a transportation system by water, highway and rail adequate to meet the needs of the commerce of the United States. It concluded:

> Bluntly stated, we fear that the proposed railroad rates if approved will drive the barge lines out of business. This may not happen, but has the Commission considered this matter sufficiently to say that it will not happen? Contrary to the railroad's contention we believe that the Commission was required to consider this matter.[5]

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[5] 134 F. Supp. 213. *Cf. Eastern-Central M. C. Ass'n* v. *United States*, 321 U.S. 194 (1944).

The power to regulate minimum rates is not necessary where there is no competition. Absent the spur of competitive bidding, no carrier will price its service *too low*. Only when there are competing sellers of the goods or services do the dangers of destructively low prices come into being. The Commission recognized this relationship between competition for traffic and the power to regulate minimum rates in *Petroleum Between Washington, Oregon, Idaho, Montana*, 234 I.C.C. 609, 637 (1939):[6]

> We were given power to fix minimum rates, however, primarily for the purpose of preventing destructive competition in rates and promoting the financial stability of the transportation agencies. Our duty in the exercise of that power is not done, therefore, if we allow competitive rates to gravitate to the lowest possible level. Minimum rates should be fixed, if it can be done, at levels which are consistent with some degree of carrier prosperity. . . .

The Commission's conclusion in that case that the proposed reduced rates, although compensatory,[7] were below a reasonable minimum level, was upheld by the United States District Court for the District of Oregon in *Scandrett* v. *United States*, 32 F.Supp. 995 (1940), *aff'd per curiam*, 312 U.S. 661. This proceeding arose before the national transportation policy was enacted and the District Court in finding for the Commission relied upon the power granted to the Commission in the Transportation Act, 1920,[8] to fix minimum rates, and the policy declaration therein to foster and preserve both rail and water transportation.[9]

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[6] *Accord, Drugs In Southern Territory*, 246 I.C.C. 563, 571-572 (1941).

[7] There the Commission found that the rates in question would return something over full costs. (234 I.C.C. at 636, 639)

[8] 41 Stat. 456.

[9] 32 F.Supp. 997-998.

In enacting that legislation, Congress gave recognition to the relation between minimum rate regulation and carrier competition. The Committee report on the bill which became the Transportation Act, 1920, noted that the power to regulate minimum rates would not only enable the Commission to prevent a railroad from reducing a rate out of proportion to the cost of service, but:

> It would also prevent a rail carrier from destroying water competition between competitive points by prohibiting such carrier from so reducing its rates as to destroy its water competitor. Circumstances have been cited where the rail carrier destroyed its water competitor by such a reduction of rates as to make it impossible for the water carrier to survive. When once competition was thus driven off the rail rates would be restored or would rise to even higher levels . . .[10]

Thus, at least since the Commission was given the power to regulate minimum rates by the Transportation Act, 1920, it has had the power to prohibit rate reductions which would constitute destructive competitive practices.

The Transportation Act of 1958 Did Not Withdraw From The Commission The Power To Prohibit Rate Reductions Which Constituted Destructive Competitive Practices

The Transportation Act of 1958[11] amended section 15a of the Interstate Commerce Act, 49 U.S.C. 15a, by adding the following paragraph:

> In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall

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[10] House Report No. 456, 66th Cong., 1st Sess., 1919, p. 19, as quoted in *Scandrett* v. *United States, supra*, 32 F.Supp. 997-998.

[11] 72 Stat. 572.

> consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

This amendment was the culmination of several years of reports and hearings, but the report of the Senate Committee on the bill which became the Transportation Act of 1958 [12] contains only two pages of discussion on this particular provision. The House Committee report on the companion bill includes only two-and-one-half pages.[13] The latter report (p. 2) characterizes the provision as "a new paragraph to guide the Commission in competitive rate cases." It notes that a much stronger bill was proposed by the Presidential Advisory Committee in 1955, but that administrative support for that more stringent bill was withdrawn. (p. 13) The report continues:

> The committee believes that each mode of transportation should have opportunity to make rates reflecting the different inherent advantages each has to offer so that the public may exercise its choice among them, cost and service both considered, in the light of the kind of transportation [it?] desires. The committee believes, however, and the national transportation policy is clear, that such ratemaking should be regulated by the Commission to prevent unfair destructive practices on the part of any carrier or group of carriers. (pp. 13-14)

The original version of the bill which eventually became the Transportation Act of 1958 [14] proposed to amend section 15a by adding the following new paragraph:

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[12] S. Rep. No. 1647, 85th Cong., 2d Sess., 1958.

[13] House Report No. 1922, 85th Cong., 2d Sess., 1958. The portions of the reports dealing with the amendment of § 15a are printed in their entirety in the appendix hereto.

[14] S. 3778, 85th Cong., 2d Sess. (1958), p. 7.

> (3) In a proceeding involving competition with another mode of transportation, the Commission, in determining whether a rail rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by railroad and not by such other mode.

After hearing, the Senate Committee amended the language to apply to the several modes of transportation subject to the Act and added the second sentence: "Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act." [15] The Committee quoted language from the report of the Surface Transportation Subcommittee [16] to emphasize that the amendment to section 15a was no revolutionary departure from existing law but was to serve only to "admonish the Commission to be consistent in following the policy enunciated in the Automobile case, [*New Automobiles in Interstate Commerce*, 259 I.C.C. 475 (1945)] thus assuring reasonable freedom in the making of competitive rates. . . ." [17]

Coming then to the amendments it made in the original bill, the Senate Committee stated:

> The committee wishes further to emphasize that the amendment in regard to section 5 amending section 15a of the act as framed by the committee is designed to encourage competition in transportation by allowing each form of transportation subject to the Interstate Commerce Act full opportunity to make rates reflecting the inherent advantages each has to offer, with such ratemaking being regulated by the Interstate Commerce Commission, however, to pre-

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[15] S. Rep. 1647, *supra*, n. 12, p. 2.

[16] Problems of the Railroads, committee print dated April 30, 1958, included in S.Rep. 1647.

[17] S. Rep. 1647, *supra*, n. 12, p. 3.

> vent "unfair or destructive competitive practices" as contemplated by the declaration of national transportation policy. Under the committee amendment the principal emphasis, but not the exclusive emphasis, in a competitive ratemaking proceeding involving different modes of transportation will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies.[18]

Thus both Committees clearly recognized the role of the national transportation policy as a guiding principle in conformity with which all of the provisions of the Act, including the newly framed amendment to the rule of ratemaking, must be administered and enforced. The language of the amendment also unambiguously states that "due consideration" shall be given to the objectives of the national transportation policy in regulating intermodal competitive rates.

The language of Section 15a(3) and its legislative history does not begin to support such a major change in the transportation law as was inferred by the district court: that the amendment was intended to limit the protection against unfair or destructive competitive practices *only* to the low-cost mode. R. 250. The conclusion of the court that the reference in 15a(3) to the national transportation policy indicates an intent that the "differential prohibition" was to be qualified only when necessary because of the interplay between the "inherent advantages" factor and the "destructive competitive" factor (R. 252), seriously restricts the scope of the phrase "destructive competitive practices," and makes other vital commands in that policy mere hortatory dressing.

The district court is also placed in the position of suggesting that Congress adopted a tortuous manner of expressing an intent to make a drastic revision in the law, while off-handedly indicating the simplicity with which such intent could have been stated. We submit that in an

[18] *Id.*, at pp. 3-4.

area as complex as competitive rate-making, Congress, had it intended to lay down as concrete a guide line as the court seems to find embedded in the language of § 15a(3), would have used much simpler and more direct language than that which it chose. It could have said, for example, that the Commission was prohibited from finding that any "compensatory" rate constituted a destructive competitive practice. And, if unwilling to leave to the Commission's discretion the interpretation of "compensatory," it could have supplied an exact definition. That it chose not to do this—but rather to re-emphasize the Commission's duty to give "due consideration to the objectives of the national transportation policy" in connection with its regulation of intermodal competitive rates—does not support the court's interpretation of Congressional intent in enacting § 15a(3).

In reaching its conclusion that the Commission order cancelling the TOFC rates in question could not stand, the court held that in order to be entitled to protection against rate-cutting competition, the water carriers here involved must be the *overall low-cost mode*, not only with respect to the particular movements in question, but beyond even the particular form of service directly involved. Thus, the water carriers must be shown to be the low-cost mode in general. R. 255-256. The court pointed out that there was not, and could not be, a finding by the Commission that the "*overall rate structure* of Sea-Land" was that of the overall low-cost mode, and referred specifically to the many boxcar rates as to which the railroad's costs appeared to be lower. R. 255-256. If protection against destructive competitive rate cutting can only be given to the carrier which proves that it is the low-cost carrier as to all of the movements for which it and the rate-cutting carrier compete, then a tremendous procedural burden is placed on both the protesting carrier and the Commission. The court refers to competition with different forms of service—TOFC and boxcar—of the rate-

cutting carrier. But the relationship of the costs of the competing modes can also vary, not only with different commodities but even with varying distances. Thus, the Commission has recognized that in the transportation of petroleum products in bulk, tank-truck costs are lower than those of the rail carriers below certain mileage limits while the reverse is true above those mileage limits.[19]

Carrying the implications of the court's reasoning to their logical conclusion, in order to win protection from destructive rate cuts, the protesting carrier must produce evidence to show that, based on its costs and the costs of the carrier proposing the rate reduction, as to all commodities, for all distances and all volumes, and as against all forms of service furnished by the rate-cutting mode, it is the overall low-cost mode. The cost of making such a case, in both time and money, is one which all but possibly the richest carriers would be unable to afford and rate reductions which are designed to monopolize particular traffic and ultimately drive competing carriers out of business would become effective by default.

The court's opinion would make mere cost computers of the Commission in cases of intermodal competitive rate-cutting. Its primary task in such cases would be to ascertain whether the aggrieved carrier was the overall low-cost mode and on that computation, and the computation whether the reduced rate covered the fully-distributed cost of the proposing carrier, would the whole decision turn. Once those computations were made the decision would be more or less automatic.

This is not the role contemplated for the Commission by a subcommittee of the Senate Committee on Interstate and Foreign Commerce, just two years after the enact-

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[19] E.g., *Gasoline and Fuel Oil, Friendship to Va. and W.Va.*, 299 I.C.C. 609, 619 (1957); *Petroleum, Colorado and Wyoming to W.T.L. Territory*, 289 I.C.C. 457, 466 (1953).

ment of the amendment. In its report on the "Decline of the Coastwise and Intercoastal Shipping Industry," [20] the Merchant Marine and Fisheries Subcommittee characterized section 15a(3) as "an important guide, though not the sole one, in settling these rate disagreements between modes," and stated that the provision "is general in its terms—allowing flexibility for the Commission to exercise wise judgment and sensible policy both in definition and application."

The subcommittee report specifically points out that in the "rail versus water context," the phrase "meet the competition" must mean a rate that takes cognizance of a water differential and, since the differential cannot be precisely defined in dollars and cents, "the expertise and wise judgment of the Commissioners must be brought into play." [21] And as one of its concluding comments, the subcommittee stated:

> As an absolute minimum, each case that brings into question the meaning of the rule of ratemaking requires a reasoned discussion of the policies that the Commission follows with respect to section 15a(3) of the Interstate Commerce Act. The express incorporation of the national transportation policy in the rule of ratemaking is a matter of substance, requiring the Commission to examine a proposed competitive rate for destructive effect as well as destructive intent to the end that a balanced and healthy transportation system by all modes is to be preserved.[22]

No such "wise judgment and sensible policy" would be permitted of the Commission under the purely mechanical functioning contemplated by the district court's decision. The court fastens on the "inherent advantage" factor and the "destructive competitive practice" factor and assumes

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[20] Committee Print, 86th Cong., 2d Sess., 1960, p. 41.

[21] *Id.* at 44.

[22] *Id.* at 50.

that only the interplay of these two factors in a certain way will permit the Commission to require a rate differential. R. 252. This ignores the clear intent of the law that due consideration be given to "the *objectives* of the national transportation policy." Within the rigid framework erected by the district court there is no room for the exercise of judgment by the Commission. Congress cannot be presumed to have stripped such basic authority from the Commission without much clearer language than is here involved.

The Power To Prevent Destructive Competitive Rate-Cutting Is Fundamental To The Regulation Of Transportation

The district court ignored the consistent interpretation of the Act and the National Transportation Policy by the Commission and the courts prior to 1958, as well as the plain meaning of Sec. 15a(3). Thus it says that even before 1958 the Commission could not have held rates unlawful merely because they would destroy carriers of competing modes, relying on the statement in *Schaffer*[23] that "the ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of 'inherent advantage' that the congressional policy requires the Commission to recognize." R. 250. But *Schaffer* did not hold, as did the district court here, that lower cost is the only inherent advantage to be recognized, much less that it is determinative. As the Supreme Court said: "How significant these advantages are in a given factual context and what need exists for a service that can supply these advantages are considerations for the Commission."[24] The Court's reversal of the Commission was because it had not given the appropriate consideration.

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[23] *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83 (1957).

[24] *Id.*, at 90.

The district court then says that since 1958 the only portions of the National Transportation Policy that have any bearing on the lawfulness of competitive rates are those referring to "inherent advantages" (which it treats as the single advantage of low cost) and "destructive competitive practices." R. 252. Thus it says that national defense has no such bearing because it is only an "end," not an operative policy in administering the Act. R. 256. This, of course, overlooks the language of Sec. 15a(3) requiring "due consideration to the objectives," i.e., the ends of the National Transportation Policy. The court's theory is that all considerations that conflict with the exploitation of a carrier's inherent cost advantage must yield. But as was said in *Schaffer*, "the National Transportation Policy is [not] a set of self-executing principles that inevitably point the way to a clear result in each case. On the contrary, those principles overlap and may conflict, and where this occurs, resolution is the task of the agency that is expert in the field." [25]

The essentially dual nature of rate regulation, and especially minimum rate regulation, in transportation has long been manifest under the Interstate Commerce Act. Such regulation is necessary not only to prevent a carrier from pricing its service below cost and thereby endangering its own financial stability, but it is necessary where competition exists to prevent destructive competitive practices. This was recognized by the Committee reporting the bill which gave the Commission the power to regulate minimum rates, it is articulated in the national transportation policy, it has been recognized by the Commission as a primary purpose of its rate-regulating power, and it was acknowledged by Congress in enacting section 15a(3).

Unless this power to prevent destructive competitive rate-cutting is retained by the Commission, there is little

[25] *Id.*, at 92.

hope of maintaining a sound national transportation system and carrying out the objectives of the national transportation policy. The instant record gives evidence of the consequences of so severely restricting the power of the Commission to carry out the objectives of the national transportation policy. The rail rates in question are but an initial step in an overall program of rate reductions that the Commission concluded would, if unchecked, threaten the continued operations and continued existence of the water carriers. R. 38. The motor carriers affected indicated that if the reduced TOFC rates were permitted, the motor-carrier rates would also have to be reduced. R. 19. The Commission acted here to head off an incipient rate war which at best could substantially deplete the revenues and weaken the financial stability of the numerous carriers involved, and at worst could result in eliminating one or more of the carriers from the scene. This ability to act to foster sound economic conditions in transportation and among the several carriers—before rates by competitive modes are allowed to gravitate to the out-of-pocket cost level, or below—is an important factor of the national transportation policy which the district court's opinion would seriously curtail. As this Court has said:

> The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.[26]

In transportation, as in other fields, an ounce of prevention is worth a pound of cure. We submit that the Congress allowed the Commission the discretion it here

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[26] *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 (1942).

exercised long prior to enactment of the Transportation Act of 1958. We likewise submit that nothing in that legislation was intended to withdraw from the Commission, under proper circumstances, the right to condemn even a rate which returns full cost. Finally, we submit that such circumstances are present here, and that the opinion of the district court places the Commission in a regulatory straitjacket which does not conform to the Congressional pattern.

Conclusion

For the reasons stated, American Trucking Associations, Inc., and National Motor Freight Traffic Association, Inc., *amici curiae*, pray that this Court will reverse the decision of the District Court and reinstate the decision of the Interstate Commerce Commission.

Respectfully submitted,

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APPENDIX

[From S.Rep. No. 1647, 85th Cong., 2d Sess., 1958, pp. 2-4]

III. Discussion of Changes in the Subcommittee Report Made by the Full Committee

Changes were made, as follows, in three of the recommendations contained in the subcommittee report:

(1) Subcommittee recommendation No. 3, "Competitive Ratemaking"

Upon consideration of the amendment recommended by the subcommittee to section 15a of the Interstate Commerce Act, designated the rule of ratemaking, the full committee agreed to further hearings on this recommendation, which were held May 20-21, 1958.

Representatives of all interested modes of transportation, railway labor, shippers, and the Interstate Commerce Commission were present and offered testimony at the hearing. Upon further consideration, the committee, in the light of this testimony, concluded that an amendment to the rule of ratemaking should apply to the several modes of transportation subject to parts I, II, III, and IV of the Interstate Commerce Act and should be constituted as a new subparagraph (3) to section 15a of the act to read as follows:

> In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

In making this amendment to section 5 of S. 3778, the committee agrees with and wishes to emphasize the import of the following excerpt from the subcommittee report:

> The subject of competitive ratemaking as between the different forms of transportation was discussed at length during the hearings, the railroads urging enactment of legislation that would restrict substantially the authority of the Interstate Commerce Commission in this field. The subcommittee is not convinced that the record before it justifies approval of the railroads' proposal.
>
> It is the policy of this subcommittee, and it is believed to be the policy of the Congress, that each form of transportation should have opportunity to make rates reflecting the different inherent advantages each has to offer so that in every case the public may exercise its choice, cost and service both considered, in the light of the particular transportation task to be performed. The subcommittee believes and the national transportation policy is clear, however, that such ratemaking should be regulated by the Commission to prevent unfair destructive practices on the part of a carrier or group of carriers.
>
> It nevertheless appears that the Interstate Commerce Commission has not been consistent in the past in allowing one or another of the several modes of transportation to assert their inherent advantages in the making of rates. The subcommittee recommends, therefore, that the Commission consistently follow the principle of allowing each mode of transportation to assert its inherent advantages, whether they be of service or of cost. In 1945 in *New Automobiles in Interstate Commerce* (259 ICC 475), the subcommittee believes that the Commission properly construed the intent of Congress in this respect when it said:
>
> "As Congress enacted separately stated rate-making rules for each transport agency, it obviously intended that the rates of each such agency should be determined by us in each case according to the facts and circumstances attending the movement of the

traffic by that agency. In other words, there appears no warrant for believing that rail rates, for example, should be held up to a particular level to preserve a motor-rate structure, or vice versa (259 ICC at p. 538)."

The subcommittee wishes to affirm the interpretation of the Commission given in the Automobile case epitomized in the words quoted above. The subcommittee therefore believes it necessary to amend the act only so as, in effect, to admonish the Commission to be consistent in following the policy enunciated in the Automobile case thus assuring reasonable freedom in the making of competitive rates. * * *

The subcommittee anticipates that the broad effect of this amendment will be to encourage competition between the different modes of transportation to the benefit of the shipping public. * * *

The subcommittee further notes that the Supreme Court in *Schaeffer Transportation Co. et al.* v. *U. S.* (No. 20, October term, decided December 9, 1957), —U. S. —, 78 S. Ct. 173, 178, in reversing the Interstate Commerce Commission for denying a motor carrier application because rail service was "reasonably adequate," said: "To reject a motor carrier's application on the bare conclusion that existing rail service can move the available traffic, without regard to the inherent advantages of the proposed service, would give one mode of transportation unwarranted protection from competition from others."

The purpose of this amendment is to produce consistency in the interpretation of the national transportation policy.

The committee wishes further to emphasize that the amendment in regard to section 5 amending section 15a of the act as framed by the committee is designed to encourage competition in transportation by allowing each form of transportation, subject to the Interstate Commerce Act full opportunity to make rates reflecting the inherent advantages each has to offer, with such ratemaking being regulated by the Interstate Commerce Com-

mission, however, to prevent "unfair or destructive competitive practices" as contemplated by the declaration of national transportation policy. Under the committee amendment the principal emphasis, but not the exclusive emphasis, in a competitive ratemaking proceeding involving different modes of transportation will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies.

* * * *

[From H.Rep. No. 1922, 85th Cong., 2d Sess., 1958, pp. 13-15]

COMPETITIVE RATEMAKING

(Sec. 5, adding a new par. (3) to sec. 15a of the act)

In the past few years probably no subject has been given any more extensive hearings or attention by the committee than that of competitive ratemaking as between the different modes of transportation.

The dominant objective of the changes in transportation policy proposed by the Presidential Advisory Committee in 1955 and of the implementing legislation (H. R. 6141 and H. R. 6142) was a proposed change in the "rule of ratemaking" (contained in sec. 15a of the Interstate Commerce Act) to place "increased reliance on competitive forces of transportation in ratemaking" and restrict the Commission's jurisdiction over competitive rates. As Secretary Weeks observed to the committee:

> It was believed that carrier self-interest tempered by the dictates of competitive enterprise is capable of producing a sounder rate structure than that which can be imposed by a regulatory agency.

During April, May, and June of 1956, in the hearings on these legislative proposals, the railroads vigorously supported the Advisory Committee recommendations, and the motor and water carriers as vigorously opposed them.

The essence of these recommendations subsequently was contained in H. R. 5523 and H. R. 5524, known as the "three-shall-not rule" because it declared that in determining what is less than a reasonable minimum rate, the Commission: (1) shall not consider the effect of the rate on the traffic of other carriers; (2) shall not consider the relation of the rate to the rate of any other carrier; and (3) shall not consider whether the rate is lower than necessary to meet the competition of other carriers. These bills were heard at length in the spring of 1957, with the same contention among the witnesses representing the various modes of transportation.

Further hearings on the subject of competitive ratemaking were held in April and May of this year, at which time Secretary Weeks expressed the view that "We have reconsidered the 'three-shall-not' rule and feel that it goes too far," and made an inchoate suggestion that while there should be greater competition among carriers in ratemaking, unfair or destructive competition should be prevented by some sort of rule of reason similar to that employed in the Sherman Act. In both the earlier and revised recommendations, the Secretary's references to stimulation of competition encompass both competition between carriers of the same mode of transportation and competition among different modes of transportation.

In these recent hearings, the railroads again advocated substantial modification of the rule of ratemaking and the motor and water carriers urged that it be retained as it is now written in the statute.

The committee believes that each mode of transportation should have opportunity to make rates reflecting the different inherent advantages each has to offer so that the public may exercise its choice among them, cost and service both considered, in the light of the kind of transportation desires. The committee believes, however, and the national transportation policy is clear, that such rate-

making should be regulated by the Commission to prevent unfair destructive practices on the part of any carrier or group of carriers.

It nevertheless appears that the Interstate Commerce Commission has not been consistent in the past in allowing one or another of the several modes of transportation to assert their inherent advantages in the making of rates. In 1945 in *New Automobiles in Interstate Commerce* (259 I. C. C. 475), the Commission said:

> As Congress enacted separately stated ratemaking rules for each transport agency, it obviously intended that the rates of each such agency should be determined by us in each case according to the facts and circumstances attending the movement of the traffic by that agency. In other words, there appears no warrant for believing that rail rates, for example, should be held up to a particular level to preserve, a motor-rate structure, or vice versa (259 I. C. C. at p. 538).

In *A. W. Schaffer Extension—Granite* (63 M. C. C. 247), the Interstate Commerce Commission denied an application by a common carrier by motor vehicle for authority to transport granite between various points which were being served exclusively by rail. The Commission based its denial of the application on the ground that the rail service was "reasonably adequate," that the main purpose of the witnesses who supported the application was to obtain lower rates rather than improved service and that this was not a proper basis for a grant of authority. The Supreme Court in *Schaeffer Transportation Co. et al* v. *U. S.* (355 U. S. 83 (1957), reversed the Commission, and in its opinion said—

> To reject a motor carrier's application on the bare conclusion that existing rail service can move the available traffic, without regard to the inherent advantages of the proposed service, would give one mode of transportation unwarranted protection from competition from others.

Later in the opinion it said:

> The ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of "inherent advantage" that the congressional policy requires the Commission to recognize.

The committee believes that the Commission consistently should follow the principle of allowing each mode of transportation to assert its inherent advantages, whether they be of cost or service, giving due consideration to the objectives of the national transportation policy declared in the Interstate Commerce Act. The objectives of this policy of the Congress are:

> to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.

The committee feels, accordingly, that an amendment to the rule of ratemaking is desirable to serve as a guide to the Commission in achieving consistency in its treatment of competitive rate cases. The bill being reported proposes a new paragraph (3) to section 15a, applicable to all of the modes of transportation subject to parts I, II, III, and IV of the act, reading as follows:

> In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

The committee is of the opinion that the effect of this amendment will be to encourage competition between the different modes of transportation for the benefit of the shipping public. It understands that the amendment, while not having the full endorsement of all of the modes of transportation, at least is not unacceptable to any of them.